



IT IS ORDERED as set forth below:

Date: August 25, 2011

Mary Grace Diehl

**Mary Grace Diehl
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

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|------------------------------|---|---|
| In Re: | : | Chapter 7 |
| | : | |
| LARRY JAMES HEARD, | : | Case Number: 08-83801-MGD |
| | : | |
| Debtor, | : | Judge Mary Grace Diehl |
| | : | |
| WINDOOR INCORPORATED, | : | |
| | : | |
| Plaintiff, | : | |
| | : | |
| v. | : | Adversary Proceeding Number: 09-6338 |
| | : | |
| LARRY JAMES HEARD, | : | |
| | : | |
| Defendant. | : | |
| | : | |

ORDER DENYING MOTION FOR CONTEMPT AND SANCTIONS

Windoor Incorporated (“Plaintiff”) and Larry James Heard (“Debtor”) settled a dischargeability action when they entered into a consent judgment. The parties agreed that Debtor’s debt to Plaintiff in the amount of \$198,010.35 (plus interest) was non-dischargeable. The consent

judgment was approved by the Court in September of 2010. Later, a writ of execution was entered. Based on Plaintiff's inability to collect on its judgment, Plaintiff sought post-judgment discovery in this action. Debtor was unresponsive to discovery requests and Plaintiff moved to compel discovery. The Court then compelled Debtor to respond to discovery requests within 15 days. Based on Debtor's failure to comply with the Court's order to compel, Plaintiff now seeks an order to incarcerate Debtor until he responds to the discovery requests. Debtor has not been afforded adequate notice and the remedy sought by Plaintiff is unwarranted under these circumstances; therefore, Plaintiff's request for contempt and sanctions is denied.

On June 16, 2011, a hearing was held on Plaintiff's Motion to Compel Discovery and for Sanctions. (Docket No. 43). The Court granted the motion to compel and declined to impose any sanctions. Counsel for Plaintiff prepared the order compelling Debtor to provide responses to Plaintiff's discovery requests within 15 days. (Docket No. 46). The service list on the Order – also prepared by Plaintiff's counsel – listed Plaintiff's counsel and Debtor. The mailing address for Debtor was in care of Debtor's *former* counsel's address.

Prior to the hearing on Debtor's motion to compel, Evan Altman filed a motion to withdraw as Debtor's counsel. (Docket No. 42). Mr. Altman appeared at the hearing on the motion to compel and stated that he was no longer able to make contact with his client. An Order granting Mr. Altman's withdrawal was entered before entry of the Order compelling discovery responses. Despite Plaintiff's counsel's failure to direct service of Debtor at his personal address, the Clerk's Office servicing agency mailed a copy of the Order compelling discovery to the Debtor's last address of record. A notice of returned mail was later filed, and the letter was marked "Not deliverable As Addressed." (Docket No. 51).

The basis of Plaintiff's motion for contempt and sanctions is Debtor's failure to comply with a court order. Because Debtor never received proper notice or service of such Order, the relief requested is unwarranted. Incarcerating Debtor based on an order that he did not receive violates due process. Further, Plaintiff hasn't fulfilled its burden of establishing that Debtor has failed to comply with a Court order. *Lawrence v. Goldberg (In re Lawrence)*, 279 F.3d 1294, 1299 (11th Cir. 2002). A finding of civil contempt must be supported by clear and convincing evidence. *Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1296 (11th Cir. 2002). The clear and convincing evidence "must establish that an order was violated." *Jove Eng'g v. I.R.S.*, 92 F.3d 1539, 1545 (11th Cir. 1996). The clear and convincing evidence must also establish that: (1) the allegedly violated order was valid and lawful; (2) the order was clear and unambiguous; and (3) the alleged violator had the ability to comply with the order. *Id.* Holding Debtor in contempt is not warranted.

Civil contempt sanctions are intended to coerce compliance with a court order. *In re Lawrence*, 279 F.3d at 1300. "When civil contempt sanctions lose their coercive effect, they become punitive and violate the contemnor's due process rights." *Id.* Should Plaintiff choose to re-plead and set forth the required evidence to allow the Court to impose civil contempt standards, any such request should include law in support of the requested sanction. In imposing contempt sanctions, the Court "must consider the character and magnitude of the harm threatened by the continued contumacy, and the probable effectiveness of any suggested sanction bringing about the result desired." *In re Chase & Sanborn Corp.*, 872 F.2d 397, 401 (11th Cir. 1989) (citation omitted). However, the sanction "imposed to coerce the contemnor to comply with the court's order,[] may not be so excessive as to be punitive in nature." *Citronelle-Mobile Gathering, Inc. v. Watkins*, 943 F.2d 1297, 1304 (11th Cir. 1991).

The Court also notes that Plaintiff may also seek to enforce its judgment against Debtor in the appropriate state court forum. Accordingly, it is

ORDERED that Plaintiff's Motion for Contempt and Sanctions is hereby **DENIED**.

The Clerk is directed to serve a copy of this Order on Plaintiff and Plaintiff's counsel.

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